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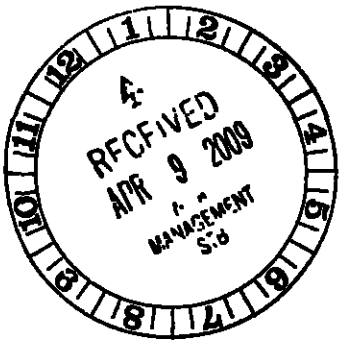


8 April 2009
by express

Hon. Anne Quinlan
Secretary
Surface Transportation Board
395 E Street SW
Washington, D.C. 20024

224850

Re: Consolidated Rail Corporation - Abandonment Exemption - in Hudson County, NJ, AB 167 (Sub-no. 1189X) and related proceedings

Dear Secretary Quinlan:

Enclosed for filing on behalf of City of Jersey City ("City"), please find the original and ten copies of a motion for reconsideration of a portion of this Board's April 6 decision in the above, and some initial comments on the SEA "environmental assessment" served March 23, 2009. These papers are submitted on behalf of City of Jersey City and RTC. It is counsel's understanding that the Embankment Preservation Coalition is proceeding separately on environmental and historic preservation issues in response to the EA, but concurs in the matters stated herein. I also enclose a copy in a separate envelope for SEA.

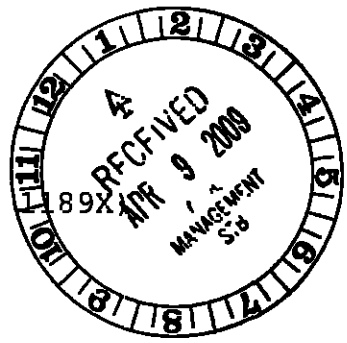
Respectfully submitted,

Charles H. Montange
for City of Jersey City
and Rails to Trails Conservancy

Encls.

cc. Counsel per certificate (w/encls)

BEFORE THE SURFACE TRANSPORTATION BOARD



CONSOLIDATED RAIL CORPORATION - ABANDONMENT EXEMPTION - IN HUDSON COUNTY, NJ	)))	AB 167 (Sub-no. 1189X)

Motion for Reconsideration
and
Initial Comments
on Environmental Assessment
by City of Jersey City
and
Rails to Trails Conservancy

This motion for reconsideration of an aspect of this Board's April 6 decision, and these comments on the environmental assessment ("EA") dated March 23, 2009, in this proceeding are submitted on behalf of City of Jersey City ("City") and Rails to Trails Conservancy ("RTC"). It is the understanding of counsel that Embankment Preservation Coalition intends to submit separate comments but concurs in these comments as well. Although this Board extended the comment period by order late-served on April 6, City and RTC are filing these initial comments at this time because we view the EA as fundamentally flawed and inconsistent, and because the Board's April 6 order gives short shrift to a de facto motion made by the Embankment Coalition concerning the newspaper notice required of Consolidated Rail Corporation ("Conrail") in this proceeding.

As these comments explain, notice of the abandonment was deficient, and the EA is inadequate, to support allowing the Board's ex parte notice of exemption purportedly authorizing abandonment to become effective. The agency must continue the stay of the effective date pending resolution of the issues

tendered below.

I. Notice

Pursuant to 49 C.F.R. 1105.12 of this Board's environmental and historic preservation regulations, Conrail must publish a notice in a newspaper of general circulation in each county in which a line is located. Heretofore, this requirement has been understood to mean notice in a paper published in each county traversed. Conrail's only newspaper notice was published in an Essex County general circulation newspaper (Star Ledger in Newark, NJ), and not in any Hudson County newspaper. But Jersey City is located in Hudson County, not Essex County. The notice requirement in 49 C.F.R. 1105.12 as traditionally understood was thus not met. Since this general notice to the public is vital given the general lack of notice and fast-track nature of 49 C.F.R. 1152.50 abandonments, it follows that no abandonment should go forward until proper notice is published and the public has been afforded a right to comment flowing therefrom.

So far as City and RTC can tell, the 1105.12 requirement has always been construed to mean notice in a general circulation newspaper published in each county traversed in a county, and not notice in any paper of general circulation which reaches a county. Thus, for example, 1105.12 notices in Iowa and Washington are published in local newspapers serving the counties traversed by a line, not the Des Moines Register, Seattle Times, or defunct Seattle P-I, even though Des Moines and Seattle are the largest population cities (like Newark) in their respective

states. Similarly, we doubt anyone heretofore would contend that publication in the New York Times would meet meaningful notice requirements for abandonments anywhere in the nation, even though it is generally circulated nation-wide.[1] In the undersigned's experience with rail abandonments, railroads customarily publish their notices in newspapers in the counties traversed by the abandonments, not in newspapers published in counties somewhere else in the state, even if that happens to be in a state's capital. Conrail did not follow this practice.

In a comment expressed on March 27, 2009, to Conrail (but mailed to other parties), Embankment Preservation Coalition objected to the newspaper notice in this proceeding as defective, and request it be "corrected." The reply period for motions under this Board's rules is 20 days. Twenty days from March 27, not counting additional days for service, would lead to a due date for replies no earlier than April 17 for Conrail and April 20 for all other parties. Yet on April 6, this Board denied the Coalition's request, before replies were due.

It is unreasonable for Conrail or this Board to expect residents of a particular county in any state, much less a populated state like New Jersey, to subscribe to newspapers from the state's largest city located in a different county. Publication of notice in the Star Ledger will simply not reach

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[1] The New York Times circulates in King County, WA, but it obviously is not an appropriate vehicle to reach the public there. Similarly, at least where, as in Hudson County, there is a newspaper of general circulation published in the County, that newspaper should and must be used.

the citizens of Hudson County to the same degree as publication in a local newspaper would, nor would it reach the audience most concerned with the abandonment. Moreover, this is not a case where there is no county-wide or "local" newspaper. The Jersey Journal, for example, is a long-established paper that serves Hudson County, of which Jersey City is the county seat.

If the agency now intends to accept publication in any newspaper in a state's largest city as adequate to reach people in all a state's counties for purposes of satsifying the environmental notice publication requirement, it has degraded the notice intended. The agency should only engage in such a policy shift by rulemaking, or at least by waiting for the reply period on the Coalition's de facto motion to expire before announcing a change in practice. Jersey City and RTC accordingly move for reconsideration of what amounts to an ex parte ruling against the Embankment Coalition's very legitimate motion. The proceeding should either be dismissed for failure to comply with environmental notice requirements, or STB needs to cause Conrail to publish a special notice to the public in a Hudson County publication of the public's right to comment on the EA, as seems to have been the intent of the Embankment Coalition's filing. Of course, the agency must also provide itself an opportunity to take into account those comments and any relief which is sought. In any event, the notice afforded by Conrail in this exemption case is deficient. Either the proceeding should be dismissed, or any abandonment authorization held in abeyance while a new notice

and opportunity for comment and to seek relief is afforded.

II. Environmental

A. Preliminary

City and RTC in this section respond to what we view as a fundamentally flawed EA. Until April 6, response was due on April 7. This time was inadequate, and the Board has recently properly granted some additional time in response to Coalition's request, as the Board was obligated to do pursuant to its predecessor's representations to the court of appeals in Illinois Commerce Commission v. ICC, 848 F.2d 1246, 1260 (D.C. Cir. 1988). City and RTC's response to the EA here is not a complete response on environmental issues, but instead focuses on basic errors and inconsistencies in the EA. Consistent with our prior requests for a full environmental impact statement, we believe that the best way to address the errors is for the Board to undertake a full EIS in this controversial abandonment case. Although the Board ordinarily prepares only an EA for rail abandonments based on information supplied by the applicant railroads, the Board unquestionably must "independently investigate and assess the environmental impact of the proposal before it," 848 F.2d at 1258, before the abandonment becomes effective. The EA here sidesteps all the issues or defers to Conrail's party line on them, and does not manifest independence, investigation or assessment.

Because we focus below on global issues, failure to discuss herein a particular point does not mean that City or RTC concur

or agree that the EA is adequate with respect to that point. RTC and City also reserve the right to prepare and to file further comments.

B. Summary

The EA basically focuses solely on the six blocks of earthen fill in this line called the "Embankment."[2] As to those structures, the EA not only ignores the historic significance of these structures, but also finds no potential adverse environmental effects on the basis of the EA's assertions/assumptions that (a) all the salvage is already done (the EA treats dismantlement of the Embankment as "re-use"), (b) it is uncertain what will happen in the future, (c) local regulation will address issues, and (d) the fill in the Embankment parcels was not classified as "hazardous waste" in a 1998 report prepared for the Jersey City Redevelopment Agency (JCRA).

1. The focus of the EA should include the entire Branch, at least between Washington Street and Waldo. Because the EA does not examine the entire line, it fails to inform the public or the Board of environmental issues, except deficiently as to the earthen filled Embankment parcels. But City and RTC are interested in a much broader portion of the Branch than merely the Embankment, even if the authors of the EA (i.e., the Section

[2] There is more to the Harsimus Branch than the Embankment. The EA fails to analyze impacts outside the Embankment parcels. Due to lack of time, we will focus on what the EA says, rather than what it does not address at all.

of Environmental Analysis, or "SEA") mistakenly feel that is the Coalition's sole focus. As to the Embankment parcels, each of the EA's rationales for finding no potential adverse environmental impact is either wrong, irrelevant, misleading, inconsistent with SEA's analysis elsewhere, or a combination of these and other defects.

2. In addition, the EA's conclusions are flawed because it only evaluates environmental impacts "other than historic preservation." EA, at 7. The EA acknowledges that numerous comments have been received about the adverse effects on historic preservation, and that none of these issues have been resolved (the EA says that "the Section 106 process is ongoing"). EA, at 15. Nonetheless, without awaiting the completion of this ongoing process and without considering these adverse effects, the EA concludes that "abandonment of the line would not significantly affect the quality of the human environment if the mitigation recommended in the EA are imposed and implemented. Therefore, the EIS process is unnecessary." EA, at 16.

This conclusion is both premature and wrong. NEPA requires federal agencies to preserve important historic and cultural aspects of our nation's heritage." 42 U.S.C. 4331(b)(2) ("surroundings") & (4); 40 C.F.R. §1508.8 (definition of "effects" include . . .aesthetic, historic, cultural . . .whether direct, indirect, or cumulative."); 40 C.F.R. § 1508.27(b).

Therefore, the EA must consider the impacts on historic properties, including the embankment and adjacent historic districts, prior to reaching any conclusion as to the significance of the environmental impacts. Once these serious adverse effects on historic properties are considered, the SEA must conclude that the effects of the action are, indeed, significant, requiring an EIS, unless sufficient, mitigation measures are imposed that resolve these adverse effects, through binding commitments.

As a practical matter, these binding commitments, if they are to be achieved, will be through the Section 106 process and any binding Memorandum of Agreement that results from that process. Accordingly, until the Section 106 process is concluded it is entirely premature for the SEA to conclude that no EIS is required.

C. Waldo

The portion of the Harsimus Branch at issue here includes two areas not addressed by the EA but significant to the public: Waldo, and at least some of the property east of the Embankment parcels. Prior Board decisions in the "River Line" proceeding indicate that Conrail sold the entire River Line to New Jersey Transit pursuant to a contract in the 1980's. Examination of the rail lines at Waldo by representatives of the City suggests that the River Line was conterminous with the Harsimus Branch for most of the distance between Waldo and the turnpike, and very close to an old cemetery which itself may be eligible for the National

Register. SEA needs to ascertain who owns what near Waldo, and the impact of abandonment on the old cemetery and on Revolutionary War skirmish sites that we also have been told exist in the vicinity. The City views that segment as vital to reach the switch and interstate rail network for freight. In addition, the segment can connect Journal Square to downtown.

C. The Six Embankment Parcels

1. Salvage activities (EA p. 8). One excuse that the EA provides for failure to analyze in any meaningful fashion the environmental consequences of the Conrail proposal is that SEA in its EA claim to have verified Conrail's claim that it has completed salvage of the Branch, that the line was sold "long ago" for development, and that any alteration of the "eight parcels" between Newark Avenue and Marin Boulevard would result from re-use by Conrail's designated developer (referred to herein as "SLH" or "SLH Properties"). In other words, SEA in its EA claims the salvage is over; that re-use eventualities are beyond STB purview or control; and that there is therefore nothing to analyze.

But the salvage is not over: six of the "eight parcels" contain a large earthen fill embankment. That "Embankment" remains intact. The remaining parcels contained two free standing stanchions, although the developer smashed one down in 2006, causing City, RTC and the Coalition to move this Board for an order barring removal pending consideration of the petition by City, et al. for a declaratory judgment that the Branch was a

line of railroad.[3]

Conrail is supposed to obtain abandonment authorization before it sells off a rail line for non-rail use, and transfer authority before it sells off a rail line to a new railroad. Conrail did neither here when it purported to alienate the Embankment parcels. The sale was therefore unauthorized and unlawful. Since no one claims that Conrail's designated developer (SLH) is a railroad, or has any intent to operate or allow one to operate (SLH clearly does not), Conrail's sale was for non-rail use. Conrail made that sale without imposing any requirement on the developer to maintain the Embankment intact. Instead, the Conrail sale was premised on dismantlement. It was a de facto salvage arrangement. The fact that Conrail contracted with a developer to handle removal no more takes this out of STB jurisdiction than if Conrail contracted with a salvager to remove a large bridge painted with lead paint over a major river. Just as the agency must consider the impact of bridge removal, the agency must consider the impact of removal of the huge earthen structures. Indeed, in magnitude (amount of work, cost, and risk), removal of the Embankment structures always has been the main salvage activity on this line, both before and after removal or rail, ties and other structures. In short, the issue is not

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[3] In order to avoid a stay order, SLH agreed not to engage in further demolition pending the declaratory proceeding. SLH has avoided becoming a party in this abandonment proceeding presumably so as to take the position it is not subject to the Board's jurisdiction, and may thus engage in demolition unhindered by STB orders.

what the developer ultimately does, but what the Conrail/developer team inevitably intend as a precursor to whatever ultimately is done, and that is salvage/dismantle/remove the five earthen fill blocks. The EA thus dismisses what should be a major focus of its inquiry. Like the thirteenth chime of a clock, that calls into question all of the EA's subsequent discussion. Indeed, to the extent SEA then purports to analyze the major salvage event, it generally constantly does so with the incorrect refrain that its analysis and role is irrelevant because this is just a re-use issue. There can be no realistic independent investigation or assessment when the party which is supposedly doing those tasks announces at the inception that there is nothing to investigate or to assess.

SEA is also inconsistent within its own EA. If as SEA claims it need not consider the environmental effects of demolition of the Embankment because the Embankment parcels have already been sold, then it is puzzling in the extreme to understand why EA can conclude that the agency has jurisdiction or authority to impose section 106 conditions adequate to protect the Embankment. If the subject matter is within STB's purview for National Historic Preservation Act purposes, then it is also for National Environmental Policy Act purposes. SEA cannot have it both ways.

Of course, if SEA concludes that the prior sale by Conrail forecloses meaningful comment, which such sale obviously would if the agency's NHPA process is as meaningless as SEA suggests the

agency's NEPA process is, then the agency must void the sale, or treat the sale as void, because the sale is inhibiting the agency's lawful exercise of its jurisdiction.

To do otherwise makes a kind of mockery of abandonment regulation. The law says that prior authorization is necessary, but according to SEA, a railroad can engage in de facto abandonment and suffer only consequences favorable to the railroad (namely, in SEA's view, the railroad may dispose of assets without any environmental or historic preservation compliance, while at the same time preempting local eminent domain remedies and foreclosing all federal remedies available when the railroad seeks abandonment authority). This encourages railroads to act unlawfully, and is arbitrary, capricious, an abuse of discretion, and beyond STB's legal authority.

For the reasons stated, the SEA claim at p. 8 that there "is no potential for significant environmental effects related to diversion of traffic and salvage activities" because these are all post-abandonment activities by a developer is incorrect, unsubstantiated, contrary to SEA's handling of the historic preservation matters, and invites wholesale violation of the law by the entire regulated industry.

Because the EA is fundamentally flawed in this regard, it is not a satisfactory basis on which the agency can allow the abandonment to become effective. The agency must start afresh with its environmental analysis and postpone any effective abandonment pending that process and further public comment

thereon.

2. Post abandonment activities (pp. 8-9). SEA next claims that what will happen to the Embankment is unclear, for Conrail asserts that the City seeks to condemn the Embankment. SEA also says that Conrail says that SLH has submitted a number of proposals to the City "that would permit the eight parcels to be developed and used for park, trail, and transit purposes." EA at 8. City and RTC are not certain where Conrail made these statements; we are guessing in ex parte contacts with SEA, and perhaps at the inspection of the Branch SEA says it engaged in and at which the City and RTC were not invited. One should always be suspicious of parties in litigation publicly making claims about what some third party is proposing in settlement. Settlement negotiations if serious generally do not take place in newspapers or in pleadings, but in private. But because SEA and Conrail have decided to publicly discuss settlement, City and RTC will try to straighten the record, at least for SEA.

We begin by questioning why SEA gave any credence to Conrail's statements about negotiations, because Conrail has not seriously participated in any, and since SEA claims that they relate to re-use issues which SEA says are not within the agency's purview. What is in the agency's purview is impact on the environment and historic preservation of salvage of the Embankment. As to that, SLH and by extension Conrail continue to insist on demolition of National Register-eligible property.

SLH has made two reasonably complete proposals to the City,

but neither of them amount to settlement proposals addressing the City's objectives. SLH's formal proposal before the City's permitting agencies has been and remains demolition of the Embankment and conversion of it to townhouses or, in the case of the eastern block, larger structures. SLH's second proposal was a public presentation to the City Council that called for the Embankment parcels to be converted into parking garages with large skyscrapers erected on top and some park aspects that appear limited to the benefit of the skyscraper occupants. City does not judge either of these proposals (or any ambiguous variant floated orally) to be consistent with resumption of rail use (a fundamental City objective), or compatible trail use, or any other compatible public use at all for that matter, over an intact corridor. City (and allied parties) proposed a comprehensive settlement to Conrail and SLH that would permit extensive development consistent with rail and other compatible public purposes (including historic preservation), and compatible with applicable federal railroad and local land use regulation. However, City's proposal (which City felt more remunerative to SLH than SLH's townhouse proposal), has been rejected.

Neither SLH nor Conrail have made any counter proposals to City (or its allies) that meet City's objectives (preservation of the Branch for rail use and other compatible public purposes). Although SLH and Conrail continue to dismiss the public's objectives before this agency and in private, the objectives are important: the Branch is the last remaining transportation

corridor into the City, and the City's current infrastructure is not adequate for planned development, much less the additional skyscrapers SLH/Conrail want to compel. Preserving it for rail and other compatible uses also mitigates potential adverse impacts from salvage, and meets National Historic Preservation Act goals.

From the point of view of City and RTC, SLH and Conrail evidently evaluate their chances of engaging in an illegal sale and avoiding any consequences from that action as remaining too high for them to entertain any serious negotiations with the City. SLH and Conrail also appear wed to the notion that the Embankment parcels are unworthy of historic preservation (they have so contended locally and at STB), and appear to be relying on litigation to drive up the City's costs until it "gives up." From time to time, their rhetoric has gotten extreme. "Pigs get slaughtered" is how the City's objectives have been dismissed in one recent instance.

If SLH and Conrail do have a proposal that is consistent with rail use and other compatible public use of the Harsimus Branch from Washington Street all the way back to Waldo, then City, RTC, and (as we understand it) the Embankment Preservation Coalition would relish seeing it. Until SLH and Conrail actually put up a legitimate settlement proposal, SEA ought not to be relying on it, or Conrail's claims about it.

As to the City's on-going intent to use eminent domain if all else fails, we will discuss that further in our analysis of

the deficiencies in SEA's discussion of the anticipatory demolition issue.

City reaffirms, as City's recent notice of intent to file an offer of financial assistance indicates, that City now seeks to acquire the entire Branch from the freight switch at Waldo as far as Washington Street for resumed rail use, which is consistent with invocation of OFA procedures, and also compatible with numerous other public purposes (including historic preservation and avoidance of adverse environmental issues relating to removal of the earthen structures).[4]

However, for purposes of analyzing the environmental consequences of abandonment, the point is that SLH is Conrail's designated salvage company. As SEA notes, Conrail claims to have sold the property to SLH Properties in 2005. SLH Properties immediately sought demolition permits and unquestionably seeks to demolish the Embankment for townhouses and/or skyscrapers. SEA cannot ignore the consequences of salvage operations on the ground that Conrail engaged in a sale of the property for non-rail purposes unlawfully prior to abandonment authorization.

This is not a case, like the Katy Trail, in which a railroad has contracted to preserve a line, thus avoiding adverse consequences to bridges and other structures. There is some precedent for the agency to put off environmental analysis of

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[4] Conrail, which seems adamantly opposed to City's acquisition of the Branch for rail purposes, has filed what amounts to a motion to reject the OFA process. Conrail continues to do everything it possible can to secure demolition of the Embankment for its chosen developer.

dismantlement activities in such circumstances. Instead, this is a case in which the railroad has designated a developer to demolish the line, and the railroad is actively participating in seeking local permits for that purpose. The agency cannot short circuit environmental and historic preservation analysis on the possibility the railroad may not get away with it for local law reasons.

Likewise, the EA's reliance on the need of the developer to get permits from Jersey City Historic Preservation Commission does not support SEA's claims of uncertainty. SLH, with Conrail concurring, takes the position that it must be granted a "hardship" exemption allowing it to demolish all of the structures in order to avoid an unconstitutional taking of its property without just compensation in violation of the Fifth Amendment. If SEA intends to rely on Commission regulation, it needs to get in touch with the Commission, review its jurisdiction, and probably in consultation with the Office of General Counsel or perhaps the Department of Justice, evaluate the SLH/Conrail claim that the Commission effectively is Constitutionally obligated to allow demolition. SEA has a duty independently to investigate and to assess; it does not discharge this duty by rubberstamping Conrail's actions to avoid environmental and historic preservation regulation.

City and RTC also note that SLH has already attempted to submit the EA to the Historic Preservation Commission (on which SEA relies) in support of granting the SLH/Conrail demolition

permits. Since the purpose of NEPA and NHPA analysis in an EA is to foster historic preservation and environmental goals, it is rather ironic that SLH feels the EA is useful for the opposite purpose.

3. Noise, dust and vibration, EA pp. 9-10. The EA claims that these impacts are temporary and that local and state traffic ordinances and permitting requirements would apply to control adverse effects. Jersey City is unaware of what permit requirements would abate the noise, dust and vibration impacts flowing from removal of the huge earthen fill structures here. The City's transportation infrastructure is already overloaded, and the additional truck traffic will be a severe strain not only on the local neighborhood streets but on arterials generally. The material being loaded on all these thousands of trucks is contaminated soil which may pose a health hazard. STB says that the 1998 report for JCRA (incorrectly referred to as a 1988 report) found that the material was not a hazardous waste. The 1998 report involved eight samples, which detected the presence of heavy metals. The report determined that the soil was contaminated, and could not be disposed as clean fill. This means it either has to be used as subsurface fill, or go to a landfill. It does not mean that it does not pose a health hazard. That is why it can only be used as subsurface fill or go to a landfill.

SEA also refers at p. 12 to a 2005 study. City and RTC would like to review that study. We request a copy from SEA, or

an identification of any person in the City to whom it has previously been furnished.

4. Traffic disruption, p. 10. The EA states that local regulation can be relied upon to address the 14,000 to 20,000 truckloads of fill material being removed, and again suggests that the Jersey City Historic Preservation Commission may not grant approval for demolition (if this is not what the EA intends to suggest, then it should omit the reference to the Commission). Neither rationale constitutes an analysis of the hazard, nor security that it does not exist. Local regulation is not adequate if infrastructure is inadequate, as the City feels it is. And as we have explained, SLH takes the position that the Commission must allow demolition on grounds of "hardship" to him. SEA cannot rely on the Commission to protect the Embankment (or anything owned by SLH) without, among other things, a reliable legal analysis showing that the Commission in fact can do so.

5. Safety, p. 13. The EA rubber-stamps Conrail's claim that "no public health or safety impacts would result from the proposed abandonment." This unsubstantiated claim in the EA is based on SEA's claim that there is no salvage and the property has all been sold to another, whose presence absolves Conrail from responsibility, and on SEA's assumption that unspecified local regulation will ameliorate any adverse impacts. This is not analysis of the safety issue; it is avoidance of meaningful analysis.

6. Historic effects under NEPA. The National Environmental

Policy Act and CEQ regulations clearly indicate that adverse impact on historic resources is every bit as much an adverse environmental impact as an increase in air pollution or traffic congestion. In the case of the Harsimus Branch, the Embankment is a well-known National Register-eligible property, and the record now seems clear that the Branch itself is eligible, and is surrounded by National Register listed or eligible structures or districts. The destruction of the Branch, and the Embankment, as a result of STB's licensing action is clearly an adverse environmental impact of significance, and Conrail has refused any mitigation to date, nor proposed any. This alone requires preparation of an EIS.

7. SEA's conclusion, p. 13. SEA says it "does not believe that the abandonment activities would cause significant environmental impacts" if its mitigation suggestions were accepted. The only mitigation suggestion SEA makes is to bar abandonment effectiveness pending some further Coastal Zone Management analysis.

While City and RTC certainly support the Coastal Zone condition, SEA's conclusion is fundamentally flawed and legally erroneous. The EA basically avoids analysis of the issues by wrongly claiming the demolition of the Embankment is a re-use, not a salvage activity, and by claiming without any support whatsoever that local regulation is available to address potential hazards flowing therefrom. The Embankment is a railroad structure which has yet to be salvaged, but which will

be under Conrail's abandonment proposal (Conrail has long been cooperating with SLH's demolition permits), and there is no identified regulation at the state or local level protecting the public from the adverse consequences of demolition. At the most fundamental level, regulation of an action cannot mitigate adverse effects if the local infrastructure and geography makes the effects unmitigatable. In addition, destruction of the Embankment is an obvious adverse environmental impact under NEPA and CEQ regulations. SEA cannot possibly maintain that it has considered and assessed that impact when it admits that it has not, and thus cannot possibly claim that there are no adverse environmental consequences because the agency is imposing some kind of Coastal Zone condition. SEA's conclusion is contrary to law.

III. Historic Review

In addition to NEPA, STB must comply with the National Historic Preservation Act (NHPA). Although NEPA and NHPA have some overlap, the compliance requirements for the two statutes differ. There are two NHPA provisions important here, as we have many times previously informed the agency: section 110(k) (anticipatory demolition) and section 106 (undertakings). Section 110(k) bars the agency from granting a license where an applicant engages in an action that amounts to evasion of environmental review upon actual application for a license. Section 106 requires consideration of impacts on historic assets in all federal undertakings.

1. Anticipatory demolition, p. 14. SEA states there was no anticipatory demolition by Conrail below because (a) rail traffic ceased by 1994, the City urged Conrail to remove the Embankment from 1984 onward, and removed a bridge in 1994, and (b) Conrail began to comply with STB procedures once the Board granted the City's petition finding that the property was a line of railroad in 2007. The SEA's analysis totally misses the point, and its conclusion is not supported by the evidence it cites or is in the record.

All the evidence on which SEA relies in the 1980's or 1990's is irrelevant. Prior to 2000, no structure on this part of the Harsimus Embankment had been determined to be eligible for the National Register. As a result, City and RTC are not protesting anticipatory demolition of bridges or rail at that time. (Indeed, there is nothing that indicates any of the removed structures which SEA mentions were in fact eligible for National Register listing in the first place.) What we all do know, including Conrail, is that as of 2000, the earthen fill Embankment itself was eligible for listing in the National Register. An action that takes that structure out of this agency's regulatory purview upon abandonment is an act of "anticipatory demolition," if the railroad did so knowingly. The railroad unquestionably attempted to take the Embankment out of this agency's regulatory purview. The railroad sold the Embankment for destruction and sought to evade STB abandonment jurisdiction by arbitrarily claiming the Branch to be a "spur."

SEA treats this gambit as totally successful for purposes of evading NEPA, and Conrail cited STB precedent that section 106 of NHPA was no longer applicable as well. Equally or perhaps more important, SLH has not acknowledged that NHPA is applicable here prior to demolition by SLH.

SEA does not even begin to address the evidence which City, RTC and Coalition supplied that Conrail acted with knowledge. City et al supplied a booklet to the agency with key information. The information shows that the Branch is a former freight rail line, that Conrail was obligated to seek prior abandonment authorization for any property it received as a line of railroad, that Conrail clearly received the Harsimus Branch as a line of railroad, that Conrail operated the line for many years after receipt as a line of railroad, and that Conrail took the position in negotiations with the City that City use of eminent domain was preempted (implying STB regulation) until just before the precipitous sale to SLH. Conrail is not a tiny short line without experience or legal counsel; it is chargeable with knowledge of the law just as is a driver of an automobile caught speeding. Although it has attempted to muddy the waters, the railroad is thus knew it could not arbitrarily claim the property was a mere "spur."[5]

[5] The practice of ICC (and later STB) at least since the Georgetown Branch case in the 1980's has been to permit railroads to remove bridges, trackage, and even switches prior to abandonment, so long as they restore same upon need prior to abandonment authorization, where the cost of repair was greater than that for removal and no shipper complaint was filed. All that happened in the 1980's and 1990's is that Conrail claimed to

But that is not all. One can easily infer Conrail's motive. As Conrail is fond of pointing out, JCRA began considering re-use options for the Embankment itself in the late 1990's. JCRA's "interest" was limited to uses that involved private redevelopment. But by 2000, the Embankment had been determined eligible for the National Register of Historic Places. Conrail as property owner was advised of this determination, and JCRA thus bowed out because of limitations on public agencies destroying historic assets. The Harsimus Branch then became a general city planning department issue.

Conrail, in a kind of pique because of the historic preservation designation (that determination effectively barred local agencies from participating in demolition of the Embankment), insisted on marketing the property for demolition anyway, in advance of abandonment authorization. The City responded by notifying Conrail that it intended to use eminent domain to acquire the property. Conrail claimed that the City

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be too economically stressed to repair its bridges, causing a hazard which the City sought to abate. STB regulates abandonments, not the City. The City's actions did not authorize an abandonment; if anything, they merely anticipated that Conrail would seek one.

City can find no record that it urged removal of the Embankment from 1984 onward. City certainly supported redevelopment of the waterfront, but did not support removal of rail for remaining shippers there, and they relied into the mid-1980's on the Embankment. The City has records showing that bridges associated with the Embankment (presumably because Conrail had stopped rail use by 1994) posed safety hazards to pedestrians and vehicles under them (pieces were falling off), and the City urged Conrail to fix or to remove them, and because Conrail claimed lack of funds, got permission to do so for one of the bridges in 1994.

was barred from use of eminent domain by federal preemption (i.e., that the property was still regulated by STB, as in fact it was).[6] Once Conrail verified federal regulation, the City could not acquire the property by eminent domain or otherwise until there was an effective abandonment authorization, or until there was a determination that the property in fact was not a "line of railroad." (City, joined by RTC and Embankment Preservation Coalition, ultimately filed a declaratory judgment proceeding for such a determination.[7])

While Conrail was thus holding off the City, Conrail knowingly sold a National Register-eligible historic asset to SLH Properties. This is an action whose clear intent was to avoid federal regulation in the event Conrail "got caught." This is an action of anticipatory demolition. Conrail's motivation is obvious: if it could get away with this anticipatory demolition, it could avoid historic and environmental regulation, and the application of a New Jersey statute that gives local agencies a kind of first refusal in all rail abandonments requiring federal authorization.

Anticipatory demolition is demonstrated when a railroad

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[6] City, et al have already supplied SEA with verified statements to this effect. Conrail's preemption claim resulted in numerous calls to STB to determine the abandonment status of the line. STB confirmed it had no record that abandonment had been authorized.

[7] It is ironic that because the Harsimus Branch is a line of railroad, the City still cannot exercise eminent domain authority, even though Conrail claims to have sold the property without prior authorization for non-rail use.

takes an action to remove a known historic asset from a known rail line subject to STB jurisdiction. From 2000 onward, Conrail knew it was dealing with a National Register-eligible asset. Conrail knew that it was dealing with a rail line, or, at worst, Conrail was willfully blind (the same as knowing) on the issue. In either event, prior to Conrail's sale of the property to SLH, Corrail asserted to the City that the property was still under STB jurisdiction. Since the line was known to be the Pennsylvania Railroad mainline for freight, and since there was no abandonment authorization, Conrail's claims of preemption were not just credible but also correct. Conrail thus knowingly and intentionally took an action to remove the section 106 property from this Board's jurisdiction. Once again, where a railroad knowingly sells a former mainline with known historic assets for non-rail use and demolition, there is an anticipatory demolition.

We judge SEA's reluctance to find anticipatory demolition to flow from its assessment that demolition of the Embankment is merely unregulated "re-use" rather than a "salvage" activity. But if that is the case, one wonders why SEA is purporting to engage in a section 106 process at all. In other words, if as SEA says, the demolition is unregulated re-use, then Conrail, or more importantly, SLH can be expected to claim that the entire section 106 process is totally lacking in meaning, and simply an exercise in going through the motions with no legal effect. In these circumstances, failure to find that Conrail's purported sale to SLH constitutes anticipatory demolition results in a

situation in which there can and will be no meaningful application of section 106 to the Embankment, for SEA has determined that its sale for demolition without required STB licensing authority does not breach the statute. Demolition being a foregone conclusion, application of section 106 becomes meaningless. SEA needs to re-examine its explanations for its inconsistent treatment of Embankment. If it is an asset to which section 106 is applicable (as City and RTC contend), then Conrail's sale was an intentional act of anticipatory demolition in advance of any STB authorization.

2. Section 106 condition, EA p. 15. Conrail in prior filings has stated that under STB precedent, section 106 does not apply to property that is not owned by the railroad. Conrail stated that it would nonetheless voluntarily comply with section 106. However, Conrail and SLH claim that SLH owns the Embankment. As of April 7, 2009, neither SLH Properties nor any affiliated entity is listed as either a party or non-party on the service list for this proceeding. SLH Properties appears now to be staying as far from STB jurisdiction as it can get. The reason is not hard to fathom: SLH is not bound by Conrail's statement that it will voluntarily comply with section 106. SLH is in the demolition business and wants to avoid more historic review. It argues at the Historic Preservation Commission that the Embankment is not historic, or at least historic enough to merit any protection, and even if it is historic, SLH says it should be allowed to demolish it all anyway, because it otherwise

will sustain economic hardship.

SEA assumes rather than explains how its proposed 106 condition will prevent demolition prior to completion of the 106 process. A section 106 condition might work if Conrail owned the property, but SEA seems to accept that Conrail does not. (That is, after all, the predicate of SEA's incorrect claim that there is no salvage activity flowing from the proposed abandonment.) Conrail's citation of STB authority that the section 106 process does not apply to property owned by a third party certainly suggests that SLH will be taking the position that whatever SEA or STB do under section 106 will have no effect on SLH's ability to demolish. In short, SLH appears poised to take the position that the section 106 condition proposed by SEA in the EA is meaningless. If SLH prevails, then allowing an abandonment in the circumstances amounts to a foreclosure of an opportunity for meaningful comment in violation of the ACHP regulations.

The clearest remedy is to void the deeds to SLH Properties so that the property clearly remains in the ownership of Conrail pending completion of the section 106 process. Although City, RTC and others have repeatedly raised this issue, SEA in its EA ignores it.

This raises another fundamental issue with SEA's analysis. The deeds to SLH either are void for Conrail's failure to comply with the pre-authorization requirement, or are voidable by the agency. If the agency has the power to void the deeds, then it is not true that Conrail has successfully removed salvage issues

from the abandonment licensing proposal as SEA claims in the EA, because the agency can require Conrail to re-assume the property. There is no question but that STB has power to void the deeds to protect its jurisdiction, which according to SEA's analysis clearly needs protection here. In any event, the deeds are void or voidable under N.J.S.A. 48:12-125.1 (voiding sales of rail property subject to federal abandonment authorization in violation of local notice requirements). Since City has repeatedly invoked this statute, SEA needs to investigate and analyze its applicability, because it is a far more credible "regulatory" device here than SEA's references to local permit requirements.

In the end, SEA needs to explain, based on the assumptions and analysis SEA offers up, how SEA's proposed section 106 condition bars SLH from tearing out the Embankment while SEA, SHPO, and consulting parties engage in the section 106 process. SEA has already said that what SLH does is otherwise a matter of "re-use," and not a subject of concern to STB licensing authority. It is unclear in the circumstances how SEA's handling of NHPA issues is consistent with its statements in the NEPA context. The NHPA material in the EA is superficial, cosmetic, inconsistent, and ineffective in its treatment of historic preservation issues. Its conclusions are erroneous, and the conditions it suggests are insufficient to comply with NEPA or NHPA under the assumptions that SEA makes. Those assumptions of course diverge from the real world, both factually and legal, and

that problem needs to be addressed as well.

3. Conclusions

In its Conclusion at p. 16, the EA says that there is no evidence of shippers potentially interested in service, citing removal of track and disuse. CNJ Rail is seeking trackage for a transload facility and of the locations it thus far suggests, City much prefers the Harsimus Branch. To this end, City and CNJ have filed notices of intent to file offers of financial assistance in connection with the Branch. City views resumed freight as feasible, given the City's broader and compatible interests in the line. City is committed to working closely with local neighborhoods to ensure that any freight operation comports with historic preservation concerns, is non-disruptive, and is compatible with light rail use and with other compatible public objectives.

IV. Public Use

Although we construe the Board's April 6 order to extend the period for public use requests, the City obviously has an interest in this rail corridor (although only grudgingly acknowledged by SEA in its references to City's intent to use eminent domain) for continued rail use, trail use, historic preservation, and other compatible public purposes. Since Conrail is refusing to cooperate in efforts to preserve the corridor, and instead since roughly 2004 has pursued a course of action contrary thereto, a public use condition barring destruction of the Embankment or sale of any interest in the

property is appropriate for the maximum period of time permitted by law (STB generally construes this to be 180 days). This time period should flow from the effective date of any abandonment authorization in order to be meaningful, for City cannot acquire until the abandonment is effective, except through the OFA process which the City has also timely invoked. This is ample justification for the conditions sought.

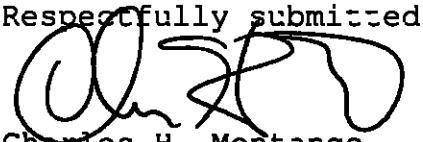
RTC wishes to note that Conrail states that it will never consent to trail use. Should this position change within the time period during which STB retains jurisdiction, counsel expects several entities may file applications for 16 U.S.C. 1247(d) to be applied. Of course, should the City acquire under OFA (or should CNJ), then this matter is moot.

V. EIS

City and RTC were surprised to learn that SEA claims to have conducted an on-site inspection, evidently with Conrail lawyers and consultants, without offering the City (and at least some representatives of the public) an opportunity to participate. A rather one-sided story line appears to be the result. As City and RTC have repeatedly stated, there are unresolved issues making this case appropriate for a full Environmental Impact Statement. An EA is used to evaluate whether a full EIS is necessary, not as a substitute. SEA's EA utterly fails to support any conclusion other than that abandonment will have significant adverse environmental impacts, especially in connection with historic assets, and the EA admits that the

impacts have not yet been analyzed. It follows that an EIS is necessary, and the abandonment may not become effective until the EIS process is completed. Nothing in Illinois Commerce Commission, supra, absolves the agency from preparing a full EIS where one is necessary.

Respectfully submitted,



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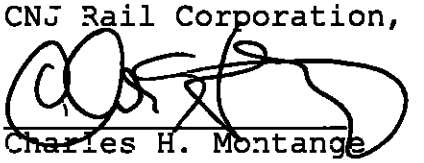
Certificate of Service

I hereby certify service of the foregoing on 8 April 2009 by deposit for express (next business day) delivery addressed to Robert Jenkins III, Mayer Brown, 1909 K Street, NW, Washington, D.C. 20006; Eric Strohmeyer, CNJ Rail Corporation, 81 Century Lane, Watchung, NJ 07069.



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